



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903

(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 24, 2014

PR 14-37

Ms. Nancy Howard

Re: Howard v. Rhode Island Turnpike and Bridge Authority

Dear Ms. Howard:

The investigation into your Access to Public Records Act ("APRA") complaint filed against the Rhode Island Turnpike and Bridge Authority ("RITBA") is complete. By correspondence dated June 30, 2014, you allege the RITBA violated the APRA when it improperly withheld records responsive to your August 9, 2013 APRA request. As you explain, your August 9, 2013 APRA request sought amendments made to a contract and this request was denied by letter dated August 13, 2013 when RITBA represented that the requested documents did not exist. Recently you contend that you received a copy of these amendments through a third party and that these amendments existed at the time of your August 9, 2013 APRA request. Accordingly, you contend that the August 13, 2013 denial was improper and deliberate.

In response to your complaint, we received an affidavit from the RITBA's legal counsel, William E. O'Gara, Esquire. Attorney O'Gara states, in pertinent part:

"On August 13, 2013 I responded to the request for documents that Ms. Howard had * * * forwarded to RITBA.

The referenced document was not produced. That was inadvertent on my part and was never an attempt to evade disclosure of the document.

In fact, the document, along with the underlying contract and subsequent amendments have been provided on multiple occasions in response to APRA requests.

The claim that there was an intent to deceive Ms. Howard is false."

We acknowledge your reply dated July 22, 2014.

In examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the RITBA violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

When determining the adequacy of an agency's search, one must measure the reasonableness of the search in light of the scope of the request. Meeropol v. Meese, 790 F.2d 942, 956 (D.C.Cir. 1986). "The agency may rely upon affidavits that are 'relatively detailed and nonconclusory, and are submitted by responsible agency officials in good faith.'" Maynard v. C.I.A., 986 F.2d 547 (1st Cir. 1993). The agency affidavit should describe both the scope and method by which the search was conducted and the structure of the agency's file system. Id. Ultimately, the adequacy of an agency's search turn on "the reasonableness of the effort in light of the specific request." Gillin v. Internal Revenue Service, 980 F.2d at 822. The "[Freedom of Information Act]"¹ requires government agencies to describe their searches in enough detail for a court to determine whether the search was sufficiently exhaustive to satisfy the Act." Riccardi v. United States Department of Justice, 2014 WL 1254616 (D.D.C.), p. 4. "To meet its burden, the agency may submit affidavits or declarations that explain in reasonable detail the scope and method of the agency's search." Id. See also Rodriguez v. Providence Police Department, 2011 WL 96678 (D.R.I.) (the Court concluded that the government efforts to locate and produce the material requested by the Plaintiff were reasonable and adequate.)

It appears you made an APRA request to the RITBA on August 9, 2013 seeking, "any changes or modifications made to the RITBA and LES Agreement dated 06 August 2012." You received a response from the RITBA's legal counsel, William E. O'Gara, Esquire on August 13, 2013 indicating that "there are no documents responsive to this request." On June 30, 2014, you filed your complaint with this Department indicating that you recently received a copy of "Amendment 1" from another citizen interested in the operation of the RITBA. You proffer that "Amendment 1" was issued on May 14, 2013, three months before your APRA requested dated August 9, 2013 and that the RITBA "deliberately withheld Amendment 1 from [you] to prevent public disclosure."

Because we had some questions concerning the RITBA's search for documents responsive to your August 9, 2013 APRA request, this Department requested Attorney O'Gara to provide a more detailed affidavit than the original affidavit provided. More

¹ The Rhode Island Supreme Court has stated that "[b]ecause [the] APRA generally mirrors the Freedom of Information Act, 5 U.S.C.A. § 552 (West 1977), we find federal case law helpful in interpreting our open record law." Pawtucket Teacher's Alliance Local No. 920 v. Brady, 556 A.2d 556, 558 n.3 (R.I. 1989).

specifically, we sought a more thorough explanation of the search and retrieval that was undertaken when the RITBA received your August 9, 2013 APRA request in order to determine whether the RITBA conducted a reasonable search for documents responsive to your APRA request. On November 21, 2014, we received an affidavit from William E. O’Gara, Esquire. Attorney O’Gara states, in pertinent part:

“In 2013 and 2014 my office responded to multiple requests for records on behalf of [the RITBA].

In response to some requests, the records were provided by RITBA and then sent out by my office.

With respect to contract documents, most of the records, to my knowledge, were in my firm’s files. To respond to the requests, the documents would be retrieved from the file and sent to the person who had made the request. I typically did the inspection of the relevant file or delegated it to a paralegal who reported back to me.

While I do not have a specific recollection of the steps taken upon receiving the request of August 9, 2013, I believe the process we followed would have been the same as I have outlined [above].

I can attest that at the time the file was inspected, the subject document was either not in the file or, by oversight, was not discovered.

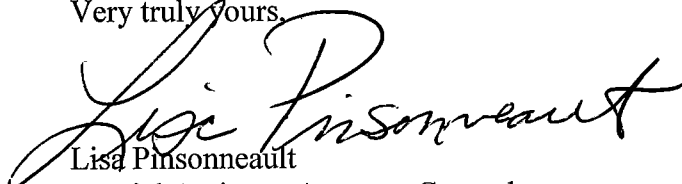
There was never any intent or motive to withhold this document from the requestor as our policy is to turn over public documents to any requestor unless the document or documents are subject to a specific privilege.”

Based upon the evidence presented, it appears that Attorney O’Gara or a paralegal searched the location where this document (Amendment 1) should have been found. Respectfully, no evidence has been provided to the contrary and no evidence has been presented that the RITBA’s omission was deliberate. Indeed, according to the undisputed evidence, the RITBA provided the same document to other persons pursuant to APRA requests, which appears to explain how you eventually came into receipt of this document. Based upon the foregoing, we cannot conclude the search to find the responsive document was unreasonable. See R.I. Gen. Laws § 38-2-4(c). We have neither been presented nor discovered any evidence to support the conclusion that the RITBA has purposefully withheld documents responsive to your original APRA request. Based upon the evidence presented, we cannot conclude that the RITBA violated the APRA by withholding or refusing to produce responsive records, or that the search and retrieval was unreasonable. We find no violation.

Although the Attorney General will not file suit in this matter at this time, nothing in the APRA precludes an individual from pursuing a complaint in the Superior Court. Please be advised that we are closing our file as of the date of this letter.

Thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



Lisa Pinsonneault
Special Assistant Attorney General
Extension 2297

LP/pl

Cc: William E. O'Gara, Esquire